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In the
Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

PETITIONERS,

v.

MIRIAM FLORES, individually and as parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as parent of Mario Rzeslawski, minor child; STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its members in their official capacities,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

RICK RICHMOND
CHRISTOPHER C. CHIOU
STEVEN A. HASKINS
KYLE T. CUTTS
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

DAVID J. CANTELME
D. AARON BROWN
PAUL R. NEIL
CANTELME & BROWN, PLC
3030 N. Central Avenue
Phoenix, AZ 85012
(602) 200-0104

KENNETH W. STARR
Counsel of Record
KIRKLAND & ELLIS LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 680-8400

ASHLEY C. PARRISH
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Counsel for Petitioners

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INTRODUCTION

Respondents and their *amici* attempt to defend the lower courts' decisions, but in the end confirm that the federal judiciary has enmeshed itself in highly politicized debates about educational policy. That intrusion should end.

In the eight years since the district court's injunction was entered, a sea change has occurred in state and national educational policies. Significant changes have also indisputably occurred in Nogales's school system. The upshot is that the district court's injunction is no longer needed, as there is no continuing violation of federal law. The injunction should be vacated, and this Court should direct the restoration of local control over Arizona's schools.

ARGUMENT

I. The Legislature Has Standing To Protect Its Legislative Prerogatives.

Respondents half-heartedly suggest that the Legislature "may" lack standing. Flores Br. 22. Jettisoning the argument they pressed below—that the President and Speaker are purportedly not representing the Legislature as a whole—Respondents opine that the Legislature should not participate in this case because the Arizona Constitution "bars the legislature from exercising an executive function." *Id.* at 21-22. The suggestion is misguided.

1. The Legislature's participation in this litigation in no wise intrudes on the Arizona

executive branch's authority. The Legislature did not spontaneously decide to join this case. Instead, it was effectively compelled to appear to *defend* its institutional interests in response to a judicial order commanding it to enact legislation on threat of multi-million-dollar fines. *See* Pet. App. 173a ("it is ordered that the legislature has 15 calendar days … to comply"); *id*. (if "the State has not complied by the end of the 2006 legislative session a $2 million dollar per day fine will be imposed"). With no party before the court adequately representing its interests, the Legislature was entitled to intervene to protect its prerogatives.

The district court's injunction is causing the Legislature concrete and particularized injury because it invades the Legislature's "plenary power over the expenditures of public money." *Proctor v. Hunt*, 43 Ariz. 198, 201 (1934). It is precisely for this reason that the Legislature formally appointed the Speaker and the President to "represent [its] interests … in this case" and to take action "on behalf of the Legislature as a whole." JA 81, 84. In these circumstances, the Legislature has standing to protect its institutional interests, preserve its members' votes, and defend the integrity of the democratic process. *See Coleman v. Miller*, 307 U.S. 433, 438 (1939); *Karcher v. May*, 484 U.S. 72, 81-82 (1987).

2. Contrary to Respondents' intimations, nothing in Arizona law obliterates the Legislature's right to defend its institutional prerogatives. Respondents rely on *State ex rel. Woods v. Block*, 189 Ariz. 269 (1997), but that inapposite case addressed whether the Legislature could create a

council to conduct general litigation on behalf of the State. Other Arizona authorities make clear that, when acting as a whole, the Legislature has standing to challenge actions by other branches of state government that result in "direct institutional injury." *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 486-87 (2006) (Legislature has standing to challenge Governor's item veto inflicting institutional injury). That conclusion is consistent with this Court's precedents, holding that a legislature has standing to appeal when its powers or duties are "directly affected" by a judicial decree. *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194-95 (1972).

3. Respondents nonetheless suggest that the Legislature is putting this Court in the "uncomfortable position" of "mediating" disputes "between state officials." Flores Br. 22. That suggestion comes with ill grace. It is the lower courts' actions, not the Legislature's response, that has spawned this state of affairs. The problem here is that a federal court improperly permitted its powers to be employed at the behest of one set of state officials to the detriment of another. There is nothing "uncomfortable" about this Court canceling out a lower federal court's invasion of a State's constitutional prerogatives. In this case, as in many others, parties are merely seeking this Court's review to determine whether the lower courts "overstepped [their] bounds," a "kind of review" that "is the standard grist of appellate courts." *Tachiona v. United States*, 386 F.3d 205, 213 (2d Cir. 2004).

As the numerous *amici* briefs attest, the district court's injunction has enmeshed the federal judiciary in hotly disputed questions of local educational policy. The lower courts' attempt to commandeer the State's legislative process to ensure victory for one side of that debate stretches the limits of judicial authority. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981) (the federal government may not "commandeer[] the legislative processes of the States"). As the Fourth Circuit has recognized, it is "an unfathomable intrusion into a state's affairs—and a violation of the most basic notions of federalism—for a federal court to determine the allocation of a state's financial resources." *Stanley v. Darlington County Sch. Dist.*, 84 F.3d 707, 716 (4th Cir. 1996). Precisely because the "legislative debate over such allocation is uniquely an exercise of state sovereignty," *id.*, a legislature has standing to be heard when its spending power is commandeered by a federal court.

II. The Ninth Circuit Misapplied The Rule 60(b) Standard.

Because the district court's injunction reflects an "unfathomable intrusion" into the State's legislative prerogatives, the lower courts should have stood ready, in the exercise of "sound judicial discretion," to modify the injunction when circumstances changed. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380 (1992) (quoting *Railway Employees v. Wright*, 364 U.S. 642, 647 (1961)). The Ninth Circuit instead applied a legally incorrect and unduly rigid Rule 60(b) standard. Respondents and the Solicitor General attempt to

defend the lower court, but their approach only underscores the Ninth Circuit's error by resurrecting the long-superseded standard from *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).

A. The Ninth Circuit's Decision Violates This Court's Precedents.

Respondents and the Solicitor General contend that the Ninth Circuit properly applied this Court's precedents and "made no mention" of *Swift*'s "grievous wrong" standard. *See* U.S. Br. 17; Flores Br. 46. To be sure, the Ninth Circuit cloaked its decision with unexceptional citations to relevant precedent and soothing references to a "flexible" standard. But beneath this ornamental layer, the Ninth Circuit's decision substantively departs from this Court's precedents in three fundamental respects. *See* Pet. Br. 37-44.

1. The Ninth Circuit refused to modify the injunction absent a showing that the legal or factual "landscape" had "*radically* changed." Pet. App. 72a (emphasis added). According to the Ninth Circuit, an injunction should not be modified except "in instances, *likely rare*, in which a prior judgment is *so undermined* by later circumstances as to render its continued enforcement inequitable." Pet. App. 60a (emphasis added). The lower court imposed this heavy burden because, as it repeatedly emphasized, the time for appeal had passed and, therefore, in its view, the "interest in finality must be given great weight." Pet. App. 51a; *see also id.* at 62a (district court's legal determinations were "unappealed and are now

final"); *id*. at 68a (refusing to "reopen matters made final").

a. The substantive burden the Ninth Circuit imposed on the Legislature was wrong as a matter of law. The lower court's approach revived in substance the superseded *Swift* standard. The requirement that circumstances "radically change," is a variation on *Swift*'s theme that changes must be "new and unforeseen." *Swift*, 286 U.S. at 119. Similarly, the admonishment that modifications to an injunction are justified only in "rare" circumstances when a judgment is "so undermined" by changed circumstances, tracks *Swift*'s rule that changes must be "so important" that "dangers, once substantial, have become attenuated to a shadow." *Id*.

Any lingering doubt that the Ninth Circuit applied the wrong standard is resolved by Respondents' own arguments. Respondents concede that *Swift* does not apply in the context of institutional reform litigation. But what they usher out the front door they seek to smuggle through the back. Citing Wright & Miller's 1995 treatise, Respondents argue that a party seeking Rule 60(b) relief may not challenge the legal or factual premises of an underlying judgment. *See* Flores Br. 30; U.S. Br. 17. But the treatise relies on cases that pre-date this Court's landmark decisions in *Rufo* and *Frew*. *See* 11 WRIGHT, MILLER, & KANE, FEDERAL PRACTICE & PROCEDURE § 2863, at 340-41 nn.18-22 (2d ed. 1995) (citing *Schildhaus v. Moe*, 335 F.2d 529 (2d Cir. 1964); *Morse-Starrett Prods. Co. v. Steccone*, 205 F.2d 244 (9th Cir. 1953)). Indeed, the treatise passages on

which Respondents rely are built around the following block quote drawn from *Swift*:

> We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting.

Id. at 341 (quoting *Swift*, 285 U.S. at 119).

b. The law has dramatically moved in the decades since Respondents' key precedents were decided. More recently, this Court has held that judicial policies favoring finality are substantially diminished by Rule 60(b), "a provision whose whole purpose is to make an exception to finality." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005) (interpreting Rule 60(b)(6)). To be sure, the Legislature does not seek to revisit the district court's initial judgment that, in 2000, Arizona's educational agencies were not taking "appropriate action." But that does not mean the remedy crafted by the court eight years ago is carved in stone. Modifying a continuing injunction in light of changed circumstances does not impermissibly reopen a final judgment; rather, it faithfully implements that judgment. *See Miller v. French*, 530 U.S. 327, 344-45 (2000).

This Court has unanimously recognized that finality considerations carry little weight in cases where a federal court enjoins state public officials.

See Frew v. Hawkins, 540 U.S. 431, 441 (2004). Federal courts are obliged to remain vigilant not to maintain a status quo that unnecessarily invades local prerogatives. Even if the "basic obligations of federal law … remain the same," the "precise manner of their discharge may not." *Frew*, 540 U.S. at 442. If there is a reason to modify an injunction, a "court should make the necessary changes." *Id.*

2. Not only did the Ninth Circuit apply the wrong standard, it focused on the wrong considerations. Specifically, the Ninth Circuit gave unwarranted weight to the former Governor's failure to appeal and her "wish" that the injunction "remain in place." Pet. App. 52a. In fact, the failure of certain named defendants to appeal is a centerpiece of the Ninth Circuit's analysis, a point it repeated no fewer than ten times. *See* Pet. App. 15a, 50a, 51a n.31, 59a, 60a, 62a, 68a, 69a, 70a n.41, 72a, 91a. Picking up the lower court's mantra, Respondents and the Solicitor General trumpet this same procedural tack. *See* Flores Br. 7,8, 10, 22, 24-26, 30, 33, 38; U.S. Br. 11, 13-15, 17-18.

a. Whether the named defendants appealed or otherwise consented to the district court's injunctive remedy plays no role in a proper Rule 60(b) analysis. *See* WLF Br. 10-15 (discussing history behind this rule). Precisely because a judicial decree risks undermining "the sovereign interests and accountability of state governments," *Frew*, 540 U.S. at 441, a court must "keep the broader public interest in mind" when considering requests to modify an injunction. *See Rufo*, 502

U.S. at 392. As this Court has emphasized, even a formal *consent* decree is open to modification, because to "refuse modification" is to "bind all future officers of the State, regardless of their view of the necessity of relief." *Id*. at 392; *see also* ALEC Br. 11-14. A State "depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources." *Frew*, 540 U.S. at 442.

b. Respondents and the Solicitor General offer no meaningful rejoinder to this fundamental principle. Their only response is the commonplace that public officials presumptively act in good faith. *See* Flores Br. 33 n.7. True (perhaps), but irrelevant. However benign officialdom's intent, the point remains that a "departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *New York v. United States*, 505 U.S. 144, 182 (1992).

In any event, the record and the repeated failures to appeal demonstrate that the Legislature's interests were not adequately represented by the named defendants and, therefore, their consent is unavailing. *See Allen v. McCurry*, 449 U.S. 90, 95 (1980). As if to underscore this point, the political maneuvering long infecting this litigation continues unabated. Under Arizona law, the Attorney General has no common law powers; indeed, as Respondents recognize, the Governor directs litigation on behalf of the executive branch. *See* Flores Br. 22; *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 470 (Ct. App. 2007) (the Governor is "the highest executive voice within this state and [may] not be ignored by a

lesser officer of the executive branch"). Nonetheless, in the face of a gubernatorial order to the contrary, the Attorney General has filed a brief that purports to represent the interests of the State of Arizona. *See* Addendum ("Add.") 2-7.

Because the Governor wants control over Arizona's schools returned to the people, *see* Add. 5, the Attorney General's brief does not represent the State's official position. But the abiding point is that no weight should be given to the "consent" of public officials circa the year 2000.

3. Like the Ninth Circuit, Respondents contend that it is not appropriate to "revisit the basic legal premises of the court's earlier orders." Flores Br. 18, 32; Pet. App. 63a (refusing to revisit "basic premises" of district court's "original rulings"). In Respondents' view, a continuing injunction may not be modified until *it* is "fully satisfied." Flores Br. 31; *id*. at 32 (requiring "full satisfaction of the judgment"); U.S. Br. 28-30 (petitioners must demonstrate "full compliance" with the district court's judgment).

This focus on a court's historical interpretation of the law—as opposed to the correct terms of the law itself—again harks back to the superseded *Swift* standard. In particular, it tracks *Swift*'s teaching that a decree "may not be changed … if the purposes of the litigation *as incorporated in the decree* … have not been fully achieved." *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968) (emphasis added) (describing *Swift*). In the context of modern institutional reform litigation, however, this Court has made clear—even in the context of constitutional violations—

that an injunction exceeds "appropriate limits" if it is "aimed at eliminating a condition that does not violate" federal law or "flow from such violation." *Board of Educ. v. Dowell*, 498 U.S. 237, 247 (1991). A continuing injunction may be enforced only if there is a substantial continuing violation of federal law, not simply a continuing violation of the injunction itself. *See id.*; *Evans v. City of Chicago*, 10 F.3d 474, 477-80 (7th Cir. 1993). The point is elementary: if local officials "can demonstrate that they have remedied the constitutional violations …, *even without compliance with the details of previous orders or plans*, they must be permitted to do so" and "federal-court oversight must terminate." *Glover v. Johnson*, 138 F.3d 229, 243 (6th Cir. 1998) (emphasis added); *Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995)).

B. Arizona Has Satisfied The "Flexible" Standard Under Rule 60(b).

In contrast to *Swift*'s focus on finality considerations and the achievement of a decree's purposes, this Court's more recent decisions make clear that courts confronted with Rule 60(b) motions should focus on their proper judicial role and whether state officials have achieved the underlying purposes of the law. Had the district court applied the "flexible," law-focused standard mandated by *Rufo* and *Frew*, it would have recognized that, in light of significant changes in law and fact, its injunction has come to undermine federal law instead of implementing it.

1. Changes In Fact Require Reassessing The Injunction.

Dramatic changes have occurred in Nogales's schools since the 2000 injunction was entered, and Nogales is now conducting effective ELL programs. *See* Pet. Br. 45-50.

1. Respondents cannot dispute that Arizona voters jettisoned the old bilingual system when, in passing Proposition 203, they required a new system of structured-English-immersion. *See* Pet. Br. 19. Respondents also cannot dispute that, in restructuring its teaching methodology, Arizona has implemented new statewide programs, curricula, and protocols to enhance ELL instruction. *See id*. at 19-21. Respondents likewise do not dispute that experienced educators, including Respondents' own key witness, testified that Nogales is conducting effective ELL programs and providing appropriate ELL instruction. *See* JA 146, 192. Nor do they dispute that the improvements in Nogales's ELL programs are reflected in measurable results. *See* Pet. App. 363a-366a (NUSD placed four schools within the top ten for student performance in 2005); JA 336-338 (NUSD students exhibited superior performance at nearly every grade level). And they offer no rejoinder to evidence that Nogales's programs are successfully preparing ELL students for mainstream classrooms. *See* Pet. Br. 24, 44-50. In fact, reclassified ELL students are not only competitive with—but in some instances outperform—native English-speaking students. *See* JA 191.

Respondents reach out to the Ninth Circuit's own assessment of the record facts. But they are unable to point to a single factual finding establishing that Nogales's schools are presently failing to conduct effective ELL programs. *See* Pet. App. 102a-116a (listing findings of fact and conclusions of law). This absence of relevant findings is not surprising given the injunction's solitary focus on funding. As the Ninth Circuit itself recognized, this case has "been about … funding since 2000." Pet. App. 69a. Adequate funding was the "only" contested EEOA issue "decided by the court" because the "rest of the EEOA violations originally alleged" were "covered by a consent decree." Pet. App. 10a (emphasis added). As Respondents conceded, the "only unresolved dispute has been the State's failure to provide school districts with adequate funding to cover the costs of the required programs." Cert. Opp. 28.

Respondents now attempt to backpedal from their concession. *See* Flores Br. 28. But the Solicitor General candidly admits that the "*only steps*" remaining to comply with the EEOA are for Arizona school districts to complete the ministerial task of submitting budget forms and "*for the legislature to appropriate funds*." U.S. Br. 32 (emphasis added). That telling statement misconceives the statutory mandate. The EEOA requires state and local educational agencies to take "appropriate action to overcome language barriers." 20 U.S.C. § 1703(f). It imposes no obligation on the legislative branch to appropriate specific levels of funding. To the contrary,

Congress "intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students." *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981).

2. Attempting to justify the funding decree, Respondents paint a gloomy picture of Nogales's schools. Their pessimism is misplaced. In particular, none of Respondents' contentions establish that Nogales's schools are failing to undertake "a genuine and good faith effort" to provide ELL students with equal educational opportunities. *Id.* And that is what the EEOA requires.

a. Respondents first contend that ELL students in Nogales's high schools perform far worse than their younger counterparts. *See* Flores Br. 39-41. But when extending its injunction, the district court made no findings regarding Nogales's high schools, let alone determined that any performance issue at the high-school level resulted from failure to take "appropriate action." There is a reason for this. The prevailing "trend [] from elementary to middle to high schools is for performance to decline" at higher grade levels for *all* students. Add. 10. In addition, "[m]ost of the research that's ever been done proves younger children starting at age four or five are most easily capable of learning a second language," and that older students "going through adolescence are not as readily willing to speak a different language in class and make mistakes." Add. 8-9, 18. Moreover, Nogales's high schools are burdened by episodic gang problems and endemic drug abuse. Pet. App. 116a. The

challenges faced by Nogales's high schools are indeed unfortunate, but they are characteristic of similar challenges around the country. *See* Tom Vander Ark, *America's High School Crisis: Policy Reforms That Will Make a Difference*, EDUCATION WEEK, Apr. 2, 2003, at 41 (high schools are the "least effective part of the American education system").

b. Respondents next assert that "significant programmatic deficiencies" remain in Nogales. Flores Br. 42. But, here again, no district court findings support this assertion. Nor is there any evidence linking these alleged deficiencies to the effectiveness of Nogales's ELL programs. Instead, the purported deficiencies serve to underscore the problems of judicial second-guessing.

Respondents suggest, for example, that Nogales cannot afford teacher aides, which they say are "essential" to ELL program success. *See* Flores. Br. 42. Yet Nogales's highly regarded former Superintendent, Kelt Cooper, eliminated teacher aides in order to improve ELL education. *See* Add. 11-14 (explaining reasons for eliminating aides). Similarly, although Respondents complain that Nogales struggles to hire qualified ELL teachers, Superintendent Cooper testified that these challenges are "no different than any other district in the United States trying to get some of the best teachers possible." Pet. App. 121a. No district court findings are to the contrary.

c. Respondents' third contention is that, even in the face of unrefuted evidence that Nogales is conducting effective ELL programs, Nogales's schools still lack sufficient funds. Respondents

assert that Arizona is required to provide ELL-specific funding to cover the "actual costs of all elements of ELL instruction" on a state-wide basis. But the requirement that ELL instruction be funded entirely by earmarked funding is a wholecloth creation of the Ninth Circuit. The fact that Arizona has chosen to provide every school district a guaranteed minimum amount of ELL-specific funding, in addition to substantial other sources of funding available for ELL instruction, should be celebrated not condemned. There is no evidence—or district court findings—that the total amount of funds available to Arizona's schools are insufficient to ensure that ELL students receive equal educational opportunities. *See* Pet. App. 177a-178a. Any failure of funding to reach specific ELL students can and should be resolved on a case-by-case basis, not through an intrusive state-wide injunction.

That the guaranteed amount of earmarked funding is arguably insufficient to cover all costs of providing ELL instruction in every Arizona school district is hardly surprising. The reality is that educational costs vary widely from school to school and district to district. It is for this reason that the suggestion, supported by the Attorney General, that Arizona should have relied on state-wide studies to determine the "actual cost" of educating ELL students is just a guise for demanding dramatic increases in funding. These sorts of costs studies are unreliable. There is no magical "actual cost" for educating ELL students that can be divined without making contentious policy judgments about complex, interrelated educational

issues. It is impossible to determine on a blanket, state-wide basis whether individual schools need more funds or should be making more efficient use of funds already available.

Contrary to Respondents' assertions, there is no obligation that the Legislature adopt a one-size-fits-all funding scheme for ELL instruction. Respondents conjure up this obligation by arguing that state law prohibits "substantial disparities" between districts in meeting "basic educational standards." Flores Br. 45-46. But the district court never determined that Nogales (or any other school district) lacks sufficient base-level funding to meet basic educational standards and conduct appropriate ELL programs. Any suggestion to the contrary is pure speculation regarding hypothetical scenarios not reflected on this record. *See id.* at 45 (imagining hypothetical situation where employing base-level funding for ELL instruction would prevent districts from meeting basic educational obligations). Nor is there anything in state law preventing local schools from taking appropriate action to address their own local circumstances. "Disparities caused by local control do not run afoul of the state constitution." *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233, 242 (1994).

Finally, Respondents contend that base-level funding is inadequate because Nogales "drew on base-level state funding to support its ELL programs at the time of the initial 2000 judgment." Flores Br. 44. But that suggestion ignores the Legislature's fundamental point: circumstances have changed. By adopting structured-English-immersion, Nogales's schools have dramatically

improved precisely because they have implemented programs and processes to encourage accountability. In this regard, Superintendent Cooper's testimony is devastating to Respondents' constant spend-more-money refrain. He testified without hesitation that, absent the structural changes that he imposed, "additional money" from the Legislature would "have made [no] difference to the[] students" in Nogales. Add. 15. There are no district court findings to the contrary.

2. Changes In Law Require Reassessing The Injunction.

Significant changes in the operative legal framework have rendered the lower court's funding mandates at war with newly-fashioned federal policies.

1. Respondents and their *amici* expend considerable energy assailing an argument the Legislature has not advanced. They characterize the Legislature as contending that NCLB "entirely displace[s]" the EEOA's requirements. Flores Br. 54; *id.* at 48, 53 (compliance with NCLB "automatically satisfies" the EEOA's mandate). The Solicitor General likewise contends that nothing in NCLB "indicates an intent to displace entirely the EEOA" and that receipt of federal funding under NCLB is not a "complete defense to liability under the EEOA." U.S. Br. 24. Respondents argue that, because NCLB and the EEOA do not completely overlap, the EEOA may be employed to remedy deficiencies not addressed in NCLB.

Those contentions may or may not be true in some other case involving individualized EEOA violations. But this case concerns a sweeping judicially-crafted remedy that operates state wide to address a purported deficiency limited to funding. The question is not whether NCLB displaces the EEOA in every context, but whether it informs the meaning of "appropriate action" in this one.

The whole purpose of NCLB is to ensure equal educational opportunities through a reticulated administrative scheme that preserves flexibility for local educators by requiring States to develop state-wide plans for educating ELL students that must be approved by the Department of Education. *See* Pet. Br. 11-16, 57-64. NCLB's detailed requirements set a baseline for defining "appropriate action" at the state level. Once a state educational plan has been approved by the Department of Education, a federal court should not wield the EEOA's opened-ended requirements to order the State to develop a different "educationally sound and administratively feasible plan" requiring increases in state-wide funding. 20 U.S.C. § 1713(g). State-wide funding mandates imposed under the EEOA will inevitably undermine the flexibility and accountability that NCLB is designed to foster.

2. Respondents and the Solicitor General complain that the EEOA and NCLB have different enforcement schemes; that NCLB gives States too much flexibility; and that Department of Education oversight is not meaningful. *See* Flores Br. 52-60; U.S. Br. 21-24. These assertions boil down to a

disagreement with the congressional policies embodied in NCLB, and reflect the view that courts are free to strike a different regulatory balance than Congress.

In any event, Respondents' and the Solicitor General's assertions are misleading. NCLB was not, as Respondents suggest, merely designed to place conditions on federal funding. *See* Flores Br. 50. To the contrary, when a State adopts a plan under NCLB, it must provide adequate assurances that all ELL students receive assistance "to achieve at high levels in the core academic subjects so that those children can meet the same … standards as all children are expected to meet." 20 U.S.C. § 6812(2). That plan must be submitted to the Department of Education, which has authority to reject the plan for failing to satisfy NCLB's requirements. *See Connecticut v. Spellings*, 453 F. Supp. 2d 161, 164-65 (D. Conn. 2006). Although NCLB creates no private right of action, its lack of judicial remedies underscores that Congress intended to limit judicial intrusions into local educational prerogatives. Contrary to the Solicitor General's suggestion, available administrative remedies are not fictional. At least twenty-four States, including Arizona, have adopted complaint procedures that permit individuals to submit Title III NCLB grievances to the Department of Education. *See* Add. 19. The regulation cited by the Solicitor General is a vestige of the pre-NCLB era; its outdated provisions do not even correspond with NCLB's titles and subparts. *See* U.S. Br. 23 n.5 (citing 34 C.F.R. § 299.10(b)).

3. Respondents and the Solicitor General argue that interpreting NCLB as informing the EEOA's "appropriate action" requirement would run afoul of NCLB's savings clause. *See* U.S. Br. 23 (citing 20 U.S.C. § 6847). Not so. The EEOA expressly delimits courts' authority to "impose only such remedies as are *essential* to correct *particular* denials of equal educational opportunity." 20 U.S.C. § 1712 (emphasis added). Although an EEOA suit may be mounted against either a local or state educational agency, *see id.* § 1720(a), nothing in the statute suggests that courts may grant remedies beyond those "essential" to correct "*particular* denials" of equal educational opportunity. *Id.* § 1712 (emphasis added). Moreover, the EEOA identifies a "priority of remedies" and requires courts to make "specific findings on the efficacy" of its chosen remedy. The most drastic remedy permitted is "the development and implementation" of an "educationally sound and administratively feasible" plan. *Id.* § 1713(g).

Respondents and the Solicitor General contend that the EEOA's limits on courts' remedial authority apply only in the context of busing and desegregation. Flores Br. 27 n.4; U.S. Br. 13 n.4. That assertion is irreconcilable with the statutory text. On its face, section 1713 applies whenever a court formulates "a remedy for a denial of equal educational opportunity." The provision's non-restrictive clause ("which may") merely recognizes that a remedy "may" involve busing. *See* BRYAN A. GARNER, A DICTIONARY OF MODERN AMERICAN USAGE 422, 647-58 (distinguishing between restrictive and non-restrictive clauses). The

provision cannot be reasonably interpreted as being limited *solely* to busing remedies. *HUD v. Rucker*, 535 U.S. 125, 131 (2002) (rejecting interpretation that "runs counter to basic rules of grammar"). In any event, the EEOA's focus on busing and desegregation confirms the Legislature's overarching point—Congress devised the EEOA to guide courts in fashioning remedies for dismantling dual school systems. 20 U.S.C. § 1702(a). Congress could not have intended to constrain courts' authority when eliminating the vestiges of segregation, but nonetheless grant courts broad discretion to dictate local educational policy.

4. Holding that federal courts should not continue to enforce an eight-year-old injunction imposing sweeping, state-wide funding mandates would not displace the EEOA. Flores Br. 54. To the contrary, the "EEOA remains a vital protection against civil rights violations." Pet. Br. 60. If local "schools" and "districts" operating under a state-approved NCLB plan fall short of their EEOA obligations, then a state or local educational agency may be required to take corrective action. *See* Asian Am. Legal Def. & Educ. Fund Br. 25-26, 35. But, under the EEOA, asserted violations of individual rights should be redressed through targeted remedies aimed at correcting "particular" deficiencies in individual schools or school districts. 20 U.S.C. § 1712; *see Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982) (courts should decide questions "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action"). There is a stark

difference between requiring educational agencies to do a better job of addressing particular deficiencies and ordering a state legislature to dispense state-wide funding remedies. Contrary to Respondents' assertions, this distinction poses no line-drawing problem. *See* Flores Br. 54 n.12. As the Court has recognized in other contexts, a "case-by-case approach" is the "traditional" and "normal … mode of operation of the courts." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 894 (1990); *see also Lewis v. Casey*, 518 U.S. 343, 359 (1996).

5. Respondents assert that the EEOA must be interpreted to authorize state-wide remedies for "systemic failures" because "most violations of the EEOA derive in some measure from broader, systemic failures." Flores Br. 54 n.12. This broadside is supported by no meaningful analysis. Nothing in the EEOA suggests that courts may require a state legislature to adopt across-the-board funding increases.

Castaneda confirms this point. Contrary to Respondents' assertions, *Castaneda* does not suggest that a federal court may mandate States to provide resources earmarked for ELL instruction. Instead, the appropriate inquiry is whether "the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school." *Castaneda*, 648 F.2d at 1010. As the Fifth Circuit explained, Congress "must have intended to insure that schools made a genuine and good faith effort, consistent with local circumstances and resources, to remedy the language deficiencies of their students." *Id.* at 1009. Accordingly, the

obligation is on the local "school system" to "follow through with practices, resources, and personnel necessary to transform" their educational theory "into reality." *Id*. at 1010. That is exactly what happened in Arizona.

3. HB 2064 Poses No Impediment To Rule 60(b) Relief.

Respondents contend that Rule 60(b) relief should be denied because HB 2064 is legally infirm. Their focus on HB 2064 confirms that this case is all about money.

1. In Respondents' view, HB 2064 is unlawful because it cuts off Group B and Structured-English-Immersion funding for ELL students after two years. *See* Flores Br. 35. But that position reflects only one side of a contentious policy debate. In Proposition 203, Arizona's citizens expressed profound dissatisfaction with costly "experimental language programs." Pet. App. 370a. Indeed, Arizona's citizens declared that "all children in Arizona public schools shall be taught English as rapidly and effectively as possible," *id*., and that ELL students "shall be educated though sheltered English Immersion during a temporary transition period *not normally intended to exceed one year*." *Id*. 373a (emphasis added). Given this, the Legislature, in turn, required a shift in funding mechanisms after two years of unsuccessful ELL instruction. It did so because, although the amount of Group B funds a school receives is based on its number of ELL students, the funds may be used for any discretionary purpose. *See* Pet. App. 306a. In that context, holding schools temporally

accountable avoids perverse incentives to keep students languishing in special-language programs.

As Respondents concede, HB 2064 does not deprive schools of funds for those ELL students who are not English-proficient after two years. *See* Flores Br. 35. Instead, HB 2064 provides additional funds for "compensatory instruction." As defined by statute, "compensatory instruction" means "programs in addition to normal classroom instruction," including "individual or small group instruction, extended day classes, summer school or intersession school," that are limited to improving the English proficiency of current and recently reclassified ELL students. Ariz. Rev. Stat. § 15-756.11(G); Pet. App. 306a. The statute thus rationally requires that, if regular ELL programs are not working, educators must take action to develop individualized programs to help struggling students. Contrary to the Solicitor General's suggestion, compensatory instruction funds are not limited to instruction "outside of the normal class day." U.S. Br. 30. Instead, they may be used at any point in the day so long as they are used "in addition to normal classroom instruction." Ariz. Rev. Stat. § 15-756.11(G). There has been no showing or finding by the district court that this approach is unsupported by sound educational theory.

2. Respondents complain that HB 2064 runs afoul of NCLB because the lower courts found that the measure violates federal supplanting restrictions. Flores Br. 36. This conclusion is flawed. NCLB merely prohibits States from employing federal funds to cover "core" educational

obligations that would otherwise be funded with state monies; it does not require that States pay *all* costs of ELL instruction. Any contrary interpretation renders meaningless NCLB's Title III, as well as several provisions of Title I, inasmuch as the statute specifically contemplates using federal funds for ELL instruction. *See* 20 U.S.C. §§ 6801, 6302.

More fundamentally, the lower court should not have reached out to decide the issue. NCLB includes no private right of action; instead, NCLB compliance falls within the Department of Education's exclusive jurisdiction. *See Spellings*, 453 F. Supp. 2d at 486-87. The district court's approach thus effectively permitted Respondents to pursue a private right of action that Congress never intended. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). To be sure, the Department of Education has issued an informal, non-binding letter suggesting that HB 2064 may, in its judgment, violate NCLB's supplanting restrictions. But that letter is not final agency action. *See General Motors Corp. v. EPA*, 363 F.3d 442, 450 (D.C. Cir. 2004) (agency correspondence not final action if it does not impose an obligation to act). Nor is it a formal determination that HB 2064 violates federal law. The district court's interceding order has thus short-circuited the ordinary administrative process.

III. The Court Should Direct The Restoration Of Local Control Over Arizona's Schools.

This case has placed the federal judiciary at the center of a highly politicized, contentious debate

over how best to run Arizona's schools. The district court's state-wide injunction, commandeering the Legislature's spending power, stretches judicial authority to its outer limits. State-wide spending mandates directed not at "educational agencies" but at a state legislature go far beyond what Congress contemplated under the EEOA and raise serious federalism and separation-of-powers concerns. Those concerns are heightened by the Attorney General's tepid defense on the merits, failure to appeal in 2000, and subsequent efforts to "defend" the district court's injunction. Flores Br. 22.

Whatever the propriety of the district court's injunction in 2000, the fact remains that in the last eight years circumstances have significantly changed. Respondents resist that conclusion, but they do not dispute that Arizona has implemented an entirely new approach to teaching ELL students; that Congress has comprehensively restructured federal education policy; and that, as the Ninth Circuit acknowledged, the State has "developed a significantly improved infrastructure for ELL programming." Pet. App. 46a. Nor can they deny that Nogales's schools are "doing substantially better." *Id.*

In light of these changed circumstances, the Rule 60(b) question is whether the federal judiciary should continue to require dramatic state-wide funding increases. The answer is no.

CONCLUSION

For the foregoing reasons, the Court should reverse the Ninth Circuit's decision below and direct the vacatur of the district court's injunction.

Respectfully submitted,

RICK RICHMOND
CHRISTOPHER C. CHIOU
STEVEN A. HASKINS
KYLE T. CUTTS
KIRKLAND & ELLIS LLP
777 South Figueroa St.
Los Angeles, CA 90017
(213) 680-8400

KENNETH W. STARR
Counsel of Record
KIRKLAND & ELLIS LLP
777 South Figueroa St.
Los Angeles, CA 90017
(213) 680-8400

DAVID J. CANTELME
D. AARON BROWN
PAUL R. NEIL
CANTELME & BROWN, PLC
3030 N. Central Avenue
Phoenix, AZ 85102
(602) 200-0104

ASHLEY C. PARRISH
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Counsel for Petitioners

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